A

TONG KIM SOO v. TIRAI PROSPEKTIF SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
KAMALUDIN MD SAID JCA

B

[CIVIL APPEAL NO: B-04(IM)-287-06-2018]
16 AUGUST 2019

C

CIVIL PROCEDURE: *Appeal – Record of appeal and memorandum of appeal – Application for extension of time to file record of appeal and memorandum of appeal – Whether mandatory to file within one month after date of notice of appeal – Whether there were inordinate delay and non-compliance of statutory provisions – Whether there was honest mistakes and valid reasons warranting delay – Rules of Court 2012, O. 55 r. 5(3)*

D

The appellant appealed against the decision of the High Court in dismissing its application for extension of time to file and serve record of appeal and memorandum of appeal. The application was made to regularise the appeal process against the decision of the Sessions Court which granted summary judgment in favour of the respondent. The facts revealed that the notice of appeal was filed on 11 August 2017. The appellant's new solicitor filed a

E

notice of change of solicitor on 5 September 2017 and served it to the respondent's solicitor on 7 September 2019. The appellant served the draft index to the respondent after the handover of cause papers and documents on 12 September 2017 which was replied on 20 September 2017. The appellant claimed that (i) the record of appeal was to be filed on

F

28 September but was rejected by the court registry as they wanted the appeal registration number to process the filing; (ii) the record of appeal was served to the respondent's solicitor on 28 September 2017; and (iii) the current solicitor was only able to obtain the appeal registration number in early November 2017 and the record of appeal was filed on 10 November 2017.

G

The notice of application for extension of time was filed on 28 December 2017. There was a 60-day delay after the filing of the notice of appeal. The Judicial Commissioner ('JC') held that (i) O. 55 r. 5(3) of the Rules of Court 2012 ('ROC'), which provides that record of appeal must be filed within one month after the date of notice of appeal, is a mandatory provision that must

H

be complied with; (ii) there was an inordinate delay and non-compliance on the appellant's part; and (iii) there was no honest mistake on the delay by the appellant and the reasons stated by the appellant were not valid reasons for the delay.

Held (dismissing appeal with costs):

I

(1) The JC only took into account the length and reason for the delay. Although it was not wrong to refuse the extension of time based on the given reasons of non-compliance found by the JC, due diligence must also be observed to hear the merit of the case in order to attain

substantial justice. There was nothing in the grounds of judgment that the JC had considered the merit of the case or the chances of the appeal succeeding and the degree of prejudice to the respondent if the application was granted. Since the JC failed to address the points submitted by the appellant in the grounds of judgment, it was fair, by way of re-hearing, to consider the merit of the case or the chances of the appeal succeeding and the degree of prejudice to the respondent if the application was granted. (paras 16, 18 & 20)

(2) Based on the background facts, there was no likelihood of chances of the appeal succeeding and the issue whether the respondent would not be prejudiced if the application was granted did not arise. In other words, there was no merit in the appellant's defence to warrant a full trial. The appellant's appeal bore no merit. (paras 32 & 33)

Case(s) referred to:

Abdul Hamid Mohd Amin v. Ramacon Corporation Sdn Bhd [2016] 3 CLJ 111 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff Tuan Mohamed [1973] 1 LNS 15 FC ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***

Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal [2017] 1 LNS 2086 CA ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

MBf Finance Bhd v. Alluwi Salleh t/a ABS Bina Enterprise & Anor [2002] 2 CLJ 133 HC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***

Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***

Tan Chai Heng v. Yeo Seng Choon [1980] 1 LNS 161 ***(refd)***

Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(1)

Rules of Court 2012, O. 14 rr. 1, 3, O. 55 r. 5(3)

For the appellant - Charlotte Diana Williams; M/s Jeeva Partnership

For the respondent - Deborah J Kaur; M/s Soraya Jabid, Deborah & Co

[Editor's note: For the High Court judgment, please see Tong Kim Soo (Berniaga Di Atas Nama Dan Gaya "Boss Commercial Trading") v. Tirai Perspektif Sdn Bhd [2019] 1 LNS 237 (affirmed).]

Reported by Najib Tamby

A

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] We heard the appellant's (defendant at the Shah Alam Sessions Court) B appeal against the decision of the learned Judicial Commissioner ("the learned JC") in dismissing the appellant's application in encl. 5 for extension of time to file and serve record of appeal and memorandum of appeal. The application was made to regularise the appeal process against the decision of the Sessions Court which granted the respondent (plaintiff) for C summary judgment on 1 August 2017.

[2] The learned JC had considered the appellant's notice of application, affidavit in support affirmed by the appellant's solicitor and the respondent's affidavit in reply affirmed by the respondent.

D **[3]** The notice of appeal was filed on 11 August 2017. The appellant's new solicitors filed a notice of change of solicitors on 5 September 2017 and served it to the respondent's solicitor on 7 September 2017. The appellant served the draft index to the respondent after the handover of cause papers and documents on 12 September 2017 which was replied on 20 September 2017.

E

[4] The appellant claimed that the record of appeal was to be filed on 28 September 2017 but was rejected by the court registry as they wanted the appeal registration number to process the filing. The appellant claimed that the record of appeal was served to the respondent's solicitor on 28 September F 2017. It was alleged that the current solicitor was only able to obtain the appeal registration number in early November 2017 and the record of appeal was filed on 10 November 2017. The notice of application for extension of time was filed on 28 December 2017.

[5] It is not disputed that there was 60 days delay after filing the notice G of appeal.

[6] At this juncture, the law is trite that record of appeal must be filed within one month after the date of notice of appeal (See O. 55 r. 5(3) of the Rules of Court 2012 (ROC 2012)).

H **[7]** Having heard the appellant's application, it was decided by the learned JC that O. 55 r. 5(3) of ROC 2012 is a mandatory provision of court rules that must be complied with. The court found that there was an inordinate delay and non-compliance on the appellant's part. (See: *Abdul Hamid Mohd Amin v. Ramacon Corporation Sdn Bhd* [2016] 3 CLJ 111; and *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain* I *Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329]

[8] The appellant's reason for the delay as averred in the affidavit was due to change of solicitors that it was the previous solicitor's mistake for not updating the current solicitors and that there was no notice from the court. Having considered the affidavit evidence, the learned JC found that there was no honest mistake on the delay by the appellant hence, the reasons stated by the appellant were not valid reasons for the delay. The appellant's application in encl. 5 was dismissed.

[9] In the Federal Court case of *Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff Tuan Mohamed* [1973] 1 LNS 15; [1974] MLJ 58, the appellant failed to serve their notice of appeal within the prescribed one month period. The Federal Court dismissed the appellant's application for an extension of time and held as follows:

> Here is a clear admission that the failure to serve the notice was due to the solicitor's mistake. Needless to say that such mistake is not a ground for granting special leave. That must be so for the obvious reason that it is not possible to draw a dividing line between a mistake which can support he exercise of a discretionary power and that which cannot. A mistake is a mistake whatever may be the reason for it.

[10] For an application to extend time to succeed, there must be circumstances which warrant the exercise of the court's discretion in favour of the applicant. There is also a long line of cases which show further that a mistake or oversight on the part of the applicant's solicitor or on the part of the solicitor's clerk is not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum or petition of appeal.

(See: *Tan Chai Heng v. Yeo Seng Choon* [1980] 1 LNS 161; [1981] 1 MLJ 271b)

[11] The omission in the part of a solicitor to be vigilant can hardly be described as an acceptable explanation.

(See: *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628; [1996] 2 MLJ 54)

[12] The burden is on the appellant to satisfy the court that it should exercise its discretion to grant an extension of time. The court had held that the Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

(See: *Ratnam v. Cumarasamy* [1964] 1 LNS 237; [1965] 1 MLJ 228)

[13] There is a presumption that the judge had rightly exercised his discretion and the appellate court must not reverse the judge's decision.

(See: *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150)

[14] Be that as it may, it is always trite that the granting of extension of time was discretionary to be exercised by the judge in each particular case. The factors to be considered were:

(i) the length of the delay;

(ii) the reasons for the delay;

(iii) the chances of the appeal succeeding; and

(iv) the degree of prejudice to the would-be respondent if the application was granted.

(See: *MBf Finance Bhd v. Alluwi Salleh t/a ABS Bina Enterprise & Anor* [2002] 2 CLJ 133; [2002] 1 MLJ 497)

[15] Our preliminary view is that if the learned JC had applied the correct test in exercising her discretion, it is trite that an appellate court will be slow in intervening in the discretionary exercise of the trial court.

(See *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; [2013] 2 MLJ 650; *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35)

[16] We noted that the grounds of judgment of the learned JC only took into account the length of delay and the reason for delay. Although it is nothing wrong to refuse the extension of time based on the given reasons of non-compliance found by the learned JC, however, we believed that due diligence must also be observed to hear merit of the case in order to attain substantial justice.

[17] This court in *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296; [2017] 5 MLJ 35 which was decided in 2017 being the latest case held that the ROC 2012 was introduced to ensure cases now have to be heard on merits and cannot be dismissed for non-compliance of rules unless there are exceptional reasons to do so. The court says as follows:

> [3] It is now well established that common sense jurisprudence has been a tool for the so called 'reasonable man' in his decision making process. This jurisprudence has been captured in a number of English decisions as well as the decision of our apex court in a number of cases in relation to decision making process by the courts. In the case of *Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd* [2016] 7 CLJ 19, the Court of Appeal had this to say:
>
> > ... Lord Denning had often reminded us that judicial decision must not be confined to law but also common sense which we these days called as purposive approach and is partly codified. (See s. 17A of the Interpretation Acts 1948 and 1967). At times, without the application of common sense, a just result cannot be achieved. Common sense approach has been adopted in a number of Malaysian judgments.

(See (a) *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457; (b) *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* [2006] FCAFC 192).

[4] The ROC 2012, to ensure the merits of the case or appeal is heard to attain substantive justice, have introduced a number of provisions to fortify the principles. Cases now have to be heard on merits and cannot be dismissed for non-compliance of rules unless there are exceptional reasons to do so. For example, O. 1A of the ROC 2012 asserts:

> ORDER 1A
>
> Regard shall be to justice (O. 1A)
>
> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

And O. 2 asserts:

> ORDER 2
>
> 1 Non-compliance with Rules (O. 2 r. 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) These Rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly. The parties are required to assist the court to achieve this overriding objective.
>
> (3) The court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.

[5] In the fifth edition of *Janab's Key to Civil Procedure* at p. 3 on non-compliance, the author had this to say:

> The previous Order 1A and Order 2 of the RHC 1980 have been further fortified to ensure that cases are heard on merits. The court before striking out, must consider the overriding interest of justice and not only the technical non-compliance of the rules. This overriding interest of justice concept is sufficiently wide enough to encompass the position and jurisprudence relating to non-compliance in the UK.

A

> [6] In the light of O. 1A and O. 2 of the ROC 2012, it is not an option anymore for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the *fiat* of the court. It is only in extremely rare cases where the non-compliance cannot be condoned at all, the court will be
B obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs.

(See also *Kenanga Investment Bank Bhd v. Swee Joo Berhad & Ors And Another Appeal* [2017] 1 LNS 2086; [2017] MLJU 2095)

C

[18] Following the above principle, we found, there is nothing mentioned in the grounds of judgment that the learned JC had considered the merit of the case or the chances of the appeal succeeding and the degree of prejudice to the respondent if the application was granted.

D **[19]** At the High Court, the appellant in the written submission had submitted before the learned JC that the Sessions Court judgment was recorded under summary proceeding ie, O. 14 of ROC 2012 thus means no full trial was held to properly determine the dispute between the two parties despite there are several issues or question in dispute which ought to be tried
E and this was the basis of the appeal where the appellant has to seek for the said judgment to be overturned and for full trial to be conducted to allow the dispute between the appellant and the respondent be heard on its merits. It was contended that the appellant's affidavit in reply disclosed five triable issues that were under looked by the Sessions Judge.

F **[20]** It was also submitted that the respondent is not substantially prejudiced if the court exercise its discretion to extend time in filing the record of appeal on the ground that the respondent had accepted the record of appeal without any protest despite it was served on them out of time. It was further submitted that the respondent failed to show in what way they
G will be prejudiced if the application is granted by the court. It was contended that the respondent will not be exposed to any prejudice element even though the application to extend time is granted.

[21] Our preliminary view is that since the learned JC failed to address the points submitted by the appellant in her grounds of judgment, we think that
H it is fair by way of rehearing to consider the merit of the case or the chances of the appeal succeeding and the degree of prejudice to the respondent if the application was granted.

[22] Section 69(1) of the Courts of Judicature Act (CJA 1964) provides that appeals shall by way of re-hearing. Section 69 of CJA 1964 states:

I

> Hearing of appeals
>
> 69. (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together

with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

[23] We heard and considered the merit of the case.

[24] The respondent's case can be summarised as follows:

(i) By a letter of offer dated 29 April 2016, the respondent at the appellant's request had agreed to let to the appellant a shop lot at G53A, Ground Floor, Segamat Johor on the terms and conditions in the said letter of offer, which were duly accepted by the appellant as the appellant had signed the part on the acceptance of the tenancy on the terms and conditions in the said letter of offer.

(ii) By cl. 22.8 of the letter of offer, the appellant was to execute the tenancy agreement as provided in the said letter of offer, however the appellant failed to execute the same.

(iii) Pursuant to the above, the appellant had sought some amendments to the terms and the amendments were agreed upon by the appellant and the respondent. Notwithstanding the aforesaid, the appellant failed to execute the tenancy agreement and by reason thereof, the appellant had repudiated the contract and the respondent proceeded to accept the repudiation and terminated the contract.

(iv) By the said suits the respondent sought and was granted the following reliefs:

(a) A declaration that the contract on the tenancy has been repudiated by the appellant and therefore terminated by the respondent;

(b) The appellant was to deliver vacant possession of the demised premises to the respondent forthwith;

A (c) The appellant to make payment to the respondent of the sum of RM111,433.60 due and owing as at 8 May 2017 being the outstanding rentals, charges and double rentals, which are liquidated damages from 15 December 2016 to 8 May 2017;

B (d) The appellant to make payment of double rentals together with goods and services tax at 6% per year from 9 May 2017 until the date of vacant possession of the demised premises is delivered to the respondent.

(e) The respondent is to forfeit the security deposit in the sum of RM36,000; and

C (f) Interest and costs in the sum of RM3,000

[25] The respondent's application for summary judgment under O. 14 ROC 2012 was heard by the Sessions Court Judge.

D **[26]** The power of the court to grant summary judgment is found under O. 14 rr. 1 and 3 of the ROC 2012. The law governing summary judgment is trite and is succinctly stated by the Federal court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300 where it was held that in order to obtain judgment, a plaintiff has first to show that he has a *prima facie* case for judgment. Once E he has done that, the burden shifts to the defendant who, in order to obtain leave to defend, must satisfy the court why judgment should not be given against him. In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400 the Supreme Court held that leave to defend will not be granted based upon "mere assertions" F by defendants; instead, the court will look at the whole situation critically to examine whether the defence is credible. In this connection, Mohamed Azmi SCJ observed:

> G Under an O.14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is H adhered to, a judge is in no position to exercise his discretion judicially in an O.14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

I **[27]** Upon considering the respondent's application and the affidavit evidence, the Sessions Court Judge came to the conclusion that the respondent's application was allowed. The only issue before the Sessions

Court Judge was whether the letter of offer dated 29 April 2016 binds parties despite several amendments to the terms and conditions in the said letter of offer.

[28] The learned Sessions Court Judge in her grounds of judgment *inter alia* found at p. 11 of the letter of offer, provides that:

> Upon acceptance of this letter of offer the terms and conditions found herein shall be binding and shall have full force and effect as between the parties herein until such time when a Sub Tenancy Agreement shall have been executed between the parties

[29] The learned Sessions Court Judge found that the respondent had informed the appellant the date of commencement and termination of tenancy agreement. There were discussions on the amendments of the terms and conditions which were agreed by the respondent. However, the appellant failed to execute the tenancy agreement hence, the terms and conditions in the letter of offer were still applicable.

[30] The respondent was relying on cl. 22.8 of the letter of offer which states that:

> In the event that the Sub Tenancy Agreement is not signed within fourteen (14) days after the notice has been sent by the Sub Landlord or the Sub Landlord solicitors to execute the same or if the Sub Tenant refused to take up the Sub Tenancy after accepting this offer, the total initial Security Deposit stated herein will be forfeited and the Sub Landlord reserve the right to claim for the monthly Gross rental of the whole unexpired term. The Sub Tenant shall within fourteen (14) days from the date of termination deliver vacant possession of the Demised Premise to the Sub Landlord in the manner and in the same condition as at the commencement of this Sub Tenancy, failing which the Sub Tenant shall be charged a sum equivalent to double the Monthly Gross Rental until the date of actual delivery of vacant possession to the Sub Landlord.

[31] The learned Sessions Court Judge accepted the above clause as giving the respondent's right to terminate the letter of offer, forfeiting the deposits, delivery of vacant and other claims. In other words, on the facts of the cases there is no triable issue of the respondent's claim that merit a full trial.

[32] Having acquainted with the background facts, it is our unanimous view that there are no likelihood chances of the appeal succeeding and the issue whether the respondent will not be prejudiced if the application was granted does not arise. In other words, there is no merit in the appellant's defence to warrant a full trial.

[33] We were satisfied that the appellant's appeal has no merit. It is our unanimous decision that the appeal is dismissed with costs of RM5,000 subject to allocator fee. The deposit if paid is to be refunded to the appellant.